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No. 88-375

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

HWESU S. MURRAY,

Petitioner,

—against—

NATIONAL BROADCASTING COMPANY, INC.
and BRANDON TARTIKOFF,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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19 pp

QUESTIONS PRESENTED

The issues before this Court are:

1) Whether the court below erred in finding that there were no material issues of fact in dispute as to the lack of novelty of petitioner's idea under controlling New York law.

2) Whether the court below erred in affirming the dismissal of the various causes of action alleged in the complaint, having properly found that petitioner's idea was not novel, and accordingly not protectible under New York law.

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents National Broadcasting Company, Inc. ("NBC")[1] and Brandon Tartikoff respectfully submit that a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit entered on April 18, 1988 (rehearing and rehearing *en banc* denied, June 1, 1988), should not issue because no question worthy of the exercise of the Court's certiorari jurisdiction is presented and because the decision below is in all respects correct.

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1 Pursuant to Rule 28.1, NBC advises the Court that NBC is a wholly owned subsidiary of National Broadcasting Company Holding, Inc. which is a wholly owned subsidiary of General Electric Company. NBC has no affiliates or subsidiaries other than wholly owned subsidiaries.

STATEMENT OF THE CASE

Petitioner Hwesu S. Murray, an NBC sports division financial manager, claims that NBC and its entertainment division president, Brandon Tartikoff, misappropriated an idea submitted by Murray to NBC personnel in 1980. Four years later, Murray alleges, his idea appeared as the critically acclaimed and financially successful *The Cosby Show* which premiered in the fall of 1984.

The complaint, filed in October, 1985, alleged misappropriation, fraud, conversion, unjust enrichment, breach of implied contract, civil RICO violations,[2] and Lanham Act violations. In addition, the complaint alleged violations of petitioner's civil rights claiming that Murray, a black American, would have successfully marketed his submission to NBC and entered into a contract with NBC as Executive Producer of the program had it not been for his race.[3] Murray sought an injunction against broadcast of *The Cosby Show*, a declaration that he is the program's owner, an accounting of profits, and $20 million in compensatory and punitive damages. Notably, petitioner did not sue for copyright infringement under the federal copyright statute, but rather for theft of an "idea" under the common law of New York.

It is neither procedurally appropriate, nor possible within the context of this brief in opposition, to combat each of the many misstatements of fact, distortions of the record and mischaracterizations of the parties' positions contained throughout the petition. Instead, respondents rely upon, and incorporate by

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2 The civil RICO claim was withdrawn by Murray at the urging of the District Court. P. App. 33a. References to "P. App." are to the appendix to the Petition for a Writ of Certiorari.

3 The Carsey-Werner Company ("Carsey-Werner"), in association with Bill Cosby, produces *The Cosby Show* and is the copyright holder. NBC is the exclusive licensee for network broadcast. Carsey-Werner, together with its principals, Marcia Carsey and Thomas Werner, were named as defendants, but were dismissed from the action at the urging of the District Court after the filing of their summary judgment motion. P. App. 25a. Petitioner's claims under 42 U.S.C. § 1985(3) (1982) were also then withdrawn. P. App. 33a.

reference, the factual expositions of the Court of Appeals (P. App. 2a-14a) and the District Court (P. App. 25a-34a) both of which assumed, for the purposes of the motion for summary judgment, the truth of the allegations of the complaint.

It is sufficient for present purposes to state that there is absolutely no evidence of any misappropriation by NBC or Tartikoff, no evidence of actual access by any person involved with the creation of *The Cosby Show*, and no evidence of discriminatory conduct. It is equally clear that all of this is irrelevant to the issue before the Court. Respondents moved for and were granted summary judgment on a single, narrow ground: that petitioner's proposal did not contain any material sufficiently novel to warrant protection under the New York law of intellectual property. That being so, as the New York Court of Appeals has made perfectly clear, " '[l]ack of novelty in an idea is fatal to any cause of action for its unlawful use.' " *Downey* v. *General Foods Corp.*, 31 N.Y.2d 56, 61, 286 N.E.2d 257, 259, 334 N.Y.S.2d 874, 877 (1972) (quoting *Bram* v. *Dannon Milk Products, Inc.*, 33 A.D.2d 1010, 307 N.Y.S.2d 571 (1st Dep't 1970)).

Respondents' motion before the District Court was based upon a simple comparison between Murray's three-page concept and scores of television programs, including Bill Cosby's own, many examples of Bill Cosby's other signature comedic materials, performed over fifteen years, and, perhaps most notably, statements by Bill Cosby himself dating back to 1965, setting forth the very same concept that Murray submitted in 1980. P. App. 2a-3a; 46a-47a.

Petitioner proposed a family situation comedy, depicting a non-stereotyped black family, featuring a father, mother and five children. J. App. 40a, 42a-43a.[4] Petitioner explained that his proposal "may well resemble *Father Knows Best* and *The Dick Van Dyke Show*." P. App. 41a-42a. According to Murray, "[t]he program derives its humor from three principal

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4 Despite Murray's claim that he based his idea on his own life, the similarities with Bill Cosby's life are unmistakable. P. App. 62a. Bill Cosby, in fact, has five children. References to "J. App." are to the Joint Appendix filed with the Court of Appeals.

sources: Bill Cosby's talent; the talent of the supporting cast; and, humorous situations at the home and the office." J. App. 42a.

Strikingly, in 1965, after the success of *I Spy*—NBC's dramatic series which featured Bill Cosby in TV's first major non-stereotyped "color-blind" role—Cosby described the series "I really have my heart set on doing." "It won't be unlike other situation comedies," *The New York Sunday News* reported,

> There'll be the usual humorous exchanges between husband and wife in the style made famous by *Dick Van Dyke* and *Mary Tyler Moore*. Warmth and domestic cheerfulness will pervade the entire program.
>
> Everything on the screen will be familiar to TV viewers. But this series will be radically different. Everyone in it will be a Negro.
>
> * * *
>
> Bill seeks to initiate the all-Negro series for one specific reason: "I'm interested in proving there's no difference between people. My series would take place in a middle-income Negro neighborhood. People who really don't know Negroes would find on this show that they're just like everyone else."[5]

This concept, articulated so simply by Bill Cosby, is consistent with his entire career as an entertainer. For more than twenty years, his family has supplied the raw material for his comedic routines and public appearances on television, in night clubs, on stage and on record albums. His signature comedic trademark, in all forms of entertainment media, has long been his portrayal of everyday family situations in a humorous, "color-blind" way. P. App. 59a-62a.

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5 Lardine, "Looking to the Future: Bill Cosby Has Dreams of an All-Negro TV Series," *New York Sunday News*, September 19, 1965, Magazine, p. 6. P. App. 2a-3a. Cosby also reiterated this theme in several interviews in the late 1960's. J. App. 100a-106a.

The District Court pointed to Bill Cosby's lifetime work, as well as to many other network television situation comedies in which racial stereotypes were avoided, many of which were presented by petitioner's own expert, Dr. J. Fred MacDonald, in his book, *Blacks and White TV: Afro-Americans in Television since 1948* (1985). P. App. 47a-55a, 59a-63a. Thus, the District Court concluded:

> Two factors preclude a finding that plaintiff's idea was sufficiently novel to be entitled to protection. First, plaintiff's proposal merely combined two ideas which had been circulating in the industry for a number of years—namely, the family situation comedy, which was a standard formula, and the casting of black actors in non-stereotypical roles, for which the television industry recognized a need. To a limited extent, the networks had already cast black actors in non-stereotypical roles.
>
> The second factor precluding a finding of novelty in this case is that *The Cosby Show* is closely related to television programs with which Bill Cosby has been associated in the past. In fact, in 1965, Cosby himself publicly expressed his desire to develop a television series depicting a middle-class black family.

P. App. 46a-47a.

Having properly determined that petitioner's idea was not novel, and thus not protectible under New York law, the District Court considered each of the claims and properly found that, lacking the underpinning of a protectible right under New York law, either in tort or contract, none of the claims could stand.

In affirming the judgment of the District Court, the Court of Appeals wrote:

> Our review of New York intellectual property law leads us to the inescapable conclusion that the district court did not err in deciding that there was no material issue of fact as to the novelty of plaintiff's proposal. In our judgment, the basic premise underlying the concept of novelty under

> New York law is that special protection is afforded only to truly innovative ideas while allowing the free use of ideas that are "merely clever or useful adaptation[s] of existing knowledge." In this case, the record indicates that plaintiff's idea for a situation comedy featuring the nonstereotypical portrayal of a black family simply was not uniquely plaintiff's creation.

P. App. 18a (citation omitted).

On June 1, 1988 Murray's petition for rehearing was denied; his suggestion for rehearing *en banc* was also denied, no judge of the Court of Appeals having requested that a vote on rehearing be taken. P. App. 75a.

ARGUMENT

NONE OF THE ISSUES RAISED BY PETITIONER WARRANTS REVIEW BY THIS COURT

The petition is little more than a thinly veiled attempt to reargue Murray's dissatisfaction with New York's intellectual property law. Knowing that a reconsideration of the state law issue in this Court is unlikely, Murray has fallen back on the time-honored catch-phrases: "creates a conflict in the Circuits," "disregards decisions of this Court," "violates constitutional rights." But here there is no substance behind the words. There are no conflicting circuit court opinions, no violation of constitutional principles and no substantial federal questions. Indeed, there is no demonstrable error.

None of the issues posed by the petition merits this Court's consideration. Murray's disagreement with New York law—despite his attempts to "federalize" it—is not an appropriate ground on which to seek this Court's review. The suggestion that the Court of Appeals engrafted a property requirement onto 42 U.S.C. § 1981 is simply erroneous. The Second Circuit specifically and expressly did not do so. The argument that the courts below resolved inferences against him and disregarded material facts in concluding that there was no material question

of fact as to the novelty of his proposal is factually untrue; in any event neither of the courts below disregarded this Court's plainly articulated summary judgment standards. The notion that the Second Circuit denied him due process, presumably because its denial of his appeal was arbitrary and capricious, is a claim obviously born more of frustration than of legal reasoning or precedent. Even a cursory examination of each of these claims demonstrates the lack of basis for the granting of a writ of certiorari.

A. The Second Circuit's Application of Well-Established Principles of New York Law Raises No Issue Worthy of this Court's Consideration

Although he attempts to disguise it, most of Murray's arguments are simply an attempt to reargue the novelty law of New York. But the law of New York is indisputable and clear.

The cornerstone of New York law is *Downey* v. *General Foods Corp.*, 31 N.Y.2d 56, 61, 286 N.E.2d 257, 259, 334 N.Y.S.2d 874, 877 (1972), where the New York Court of Appeals, in affirming dismissal of a variety of tort and contract claims stemming from a claim of idea theft, wrote:

> An idea may be a property right. But, when one submits an idea to another, no promise to pay for its use may be implied, and no asserted agreement enforced, if the elements of novelty and originality are absent, since the property right in an idea is based upon these two elements.

Id. (citations omitted).

The oft-quoted New York standard for novelty is expressed as follows: To be novel,

> [an] idea need not reflect the "flash of genius," but it must show genuine novelty and invention, and not a merely clever or useful adaptation of existing knowledge. Improvement of standard technique or quality, the judicious use of existing means, or the mixture of known ingredients in somewhat different proportions—all the

> variations on a basic theme—partake more of the nature of elaboration and renovation than of innovation.

Educational Sales Programs, Inc. v. *Dreyfus Corp.*, 65 Misc. 2d 412, 416, 317 N.Y.S.2d 840, 844 (Sup. Ct. N.Y. Co. 1970) (citations omitted).[6]

New York law allows neither a tort action nor an enforceable contract, express or implied, if the underlying idea is not novel, since such an idea is "in the public domain and may freely be used by anyone with impunity." *Ed Graham Productions, Inc.* v. *National Broadcasting Co.*, 75 Misc. 2d 334, 337, 347 N.Y.S.2d 766, 769 (Sup. Ct. N.Y. Co. 1973). The courts below properly applied controlling New York law in dismissing petitioner's common law claims;[7] their dismissal raises no question warranting this Court's review.

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6 In a strained attempt to identify a split in the circuits, Murray cites to *Official Airline Schedule Information Service, Inc.* v. *Eastern Airlines Inc.*, 333 F.2d 672, 675 (5th Cir. 1964) for the proposition that New York's novelty requirement is only applied to unsolicited ideas, in contrast to the Second Circuit's holding in this case. Murray's reference to Judge Rives's concurring opinion does no more than establish that New York's novelty law applies to unsolicited idea submissions. It does not stand for the proposition that solicited submissions need not be novel under New York law and as such creates no conflict with the Second Circuit. In any event, even if there were a conflict between the Fifth and Second Circuits on an issue of New York law, which there is not, such a conflict is not the type that warrants the exercise of this Court's certiorari jurisdiction.

7 Petitioner's attempt to dress his intellectual property claim as a claim for conversion was also properly dismissed by the courts below. To the extent that the claim was premised on the unsupported allegation that his proposal had been copied by NBC before being returned to him, such a claim "constitutes far too insubstantial an interference with property rights to demonstrate conversion." *Harper & Row, Publishers, Inc.* v. *Nation Enterprises*, 723 F.2d 195, 201 (2d Cir. 1983), *rev'd on other grounds*, 471 U.S. 539 (1985). To the extent petitioner predicated his conversion claim on the use of the contents of the documents, the right he sought to protect is coextensive with an exclusive

B. The Second Circuit Properly Affirmed the Dismissal of Petitioner's Civil Rights Claims

The Second Circuit did not, as Murray pretends, merge 42 U.S.C. §§ 1981 and 1982,[8] nor did it attempt to "repeal" section 1981. Rather, the Court of Appeals explicitly "agree[d] with plaintiff that section 1981 does not speak in terms of property," citing *Runyon* v. *McCrary*, 427 U.S. 160, 170-71 (1976) (P. App. 16a), the very authority petitioner incomprehensibly claims the court disregarded. Petition at 25, 27. Having found that petitioner's proposal was not novel, the court below properly concluded that Murray has no cognizable civil rights claim under section 1981. Murray's argument that a "property" standard has been incorporated confuses "property" with "consideration."

Section 1981 creates no substantive rights. While the statute guarantees an *equal* right to contract, there must be an underlying contract right upon which to base a section 1981 claim:

> On a claim under § 1981, a plaintiff must show *both* that he was subjected to intentional discrimination, and *that this discrimination interfered with a contractual relationship.*

Krulik v. *Board of Education*, 781 F.2d 15, 23 (2d Cir. 1986) (emphasis added; citations omitted).[9]

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right protected by the Copyright Act. "As such, [his] conversion claim is necessarily preempted" under 17 U.S.C. § 301 (1982). *Harper & Row, Publishers, Inc.* v. *Nation Enterprises*, 723 F.2d at 201. *Accord Quincy Cablesystems, Inc.* v. *Sully's Bar, Inc.*, 650 F. Supp. 838, 849-50 (D. Mass. 1986).

8 Apart from his general disagreement with the application of New York's novelty law, petitioner does not otherwise contest the dismissal of his claim under § 1982; nor does he appear to dispute the dismissal of his Lanham Act claim.

9 Murray's unsupported assertion that federal and not state law applies to the contract is simply not correct. There is no federal law of contracts as such. Murray's fear that discrimination would mean dif-

As the Second Circuit recognized:

> Given the lack of novelty in plaintiff's idea there could be no *consideration* for the alleged promise and hence no enforceable contract right upon which to base a section 1981 claim.

P. App. 17a (citations omitted; emphasis added).

Petitioner offered to respondents something of no legal value—an idea already in the public domain, indeed one that was put forward fifteen years earlier by the distinguished actor and comedian who would later star in the series and be rightfully credited for its success. Accordingly, petitioner's claim does not rise to the level of a civil rights violation. "Section 1981 is by its very terms . . . not an affirmative action program. It is an equalizing provision seeking to ensure that rights do not vary according to race." *Long* v. *Ford Motor Co.*, 496 F.2d 500, 505 (6th Cir. 1974). A white person who approaches NBC with a non-novel idea has no right to force a contract upon the network. Petitioner has no greater right because he is black.[10]

C. The Second Circuit Properly Applied the Summary Judgment Standard

Murray's arguments that the Second Circuit failed to apply the proper standard in reviewing a motion for summary judg-

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ferent things in different states is also unfounded. Section 1981 gives a black person equal rights, but no more rights, than a white person; where a white person has no contract rights under applicable state law, a black person has none greater. *See generally* Congressional Globe, 41st Cong., 2d Sess. 3883 (May 27, 1870) (remarks of Rep. Bingham).

10 In another attempt to manufacture a conflict among the circuits, Murray cites the Fifth Circuit's decision in *Gonzalez* v. *Southern Methodist University*, 536 F.2d 1071 (5th Cir. 1976), *cert. denied*, 430 U.S. 987 (1977) for the proposition that the "absence of a § 1982 claim does *not* preclude a § 1981 claim." Petition at 25. As demonstrated above, the Second Circuit did not hold otherwise; indeed it specifically noted the distinction between § 1981 and § 1982 (P. App. 16a) and cited the Fifth Circuit's opinion in *Gonzalez* (*id.*).

ment boil down to the claim that factual material introduced by him in an attempt to defeat summary judgment was disregarded or inferences to be drawn therefrom were resolved against him.[11]

At bottom, Murray is claiming that respondents admitted that his idea was novel. The issue centers on the agreement between NBC and the Carsey-Werner Company, the producers of *The Cosby Show*, whereby Carsey-Werner agreed to provide NBC with a demonstration tape and several fully-produced episodes of *The Cosby Show*, and NBC agreed to pay for a license to broadcast these episodes and finance certain production costs. Murray relies upon a remedial provision of this agreement which states: "Willful failure by the packager [*i.e.*, Carsey-Werner] to perform hereunder shall cause NBC irreparable loss of a unique, intellectual property warranting equitable relief to prevent such a loss." J. App. 257a.

As the Second Circuit realized, this provision, obviously meant to provide the basis for injunctive relief in lieu of money damages, could only apply to a fully-produced program, not to the underlying concept:

> The Carsey-Werner contract contemplates a fully-produced television series. The contract refers to, *inter alia*, the program format, titles, set designs, theme music, stories, scripts, and art work as well as to the "program idea."

P. App. 12a-13a.

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11 The courts below faithfully adhered to the summary judgment standards set forth in Fed. R. Civ. P. 56(c) and this Court's holdings in *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242 (1986), *Celotex Corp.* v. *Cartrett*, 477 U.S. 317 (1986), and *Matsushita Electric Industrial Co.* v. *Zenith Radio Corp.*, 475 U.S. 574 (1986).

The courts below found that petitioner presented no facts showing that his idea was novel and the "failure of proof on [this] essential element of [his] case . . . 'necessarily render[ed] all other facts immaterial.' " P. App. 36a (quoting *Celotex*, 477 U.S. at 323). As the Court of Appeals concluded, "after drawing all reasonable inferences in favor of" petitioner, "no reasonable trier of fact could find in [his] favor." P. App. 9a.

The dissent below reasoned that the purpose for the remedial clause was to protect the underlying idea and insure its return to NBC: "In other words, from the outset NBC wanted to make certain that if its relationship with Carsey-Werner faltered, the novel idea it had given Carsey-Werner would be protected from disclosure." P. App. 20a.[12] This is factually incorrect. The agreement gave NBC no rights at all in the program idea. NBC has no power under the agreement to limit disclosure of the program concept; rather, it was granted the right, on network television, to broadcast the fully-produced programs supplied by Carsey-Werner. The purpose of the injunctive clause is, clearly, to stop the producers from delivering the fully-produced program to another telecaster, and forcing NBC to prove damages. There is simply no reasonable inference of admission of novelty that can therefore be drawn from this document.

Likewise, statements by Brandon Tartikoff or Bill Cosby that *The Cosby Show* is unique are irrelevant. The fact that *The Cosby Show* as broadcast is unique does not answer the legal question of whether petitioner's proposal for a non-stereotyped situation comedy is novel under New York law. *See McGhan* v. *Ebersol*, 608 F. Supp. 277, 287 (S.D.N.Y. 1985) (plaintiff "cannot rely on the press releases distributed by NBC to promote the show and listing the show as 'revolutionary' and containing 'a substantial amount of feature material that viewers won't be able to see anywhere else' as proof that he contributed novel ideas to [the show where he] has been unable to point to *any specific component* . . . that did not have its origin either in [another specific show] or in the industry in general") (emphasis added).

D. The Decision of the Court Below Does Not Violate Petitioner's Due Process Rights

Petitioner's final argument is that somehow he has been "arbitrarily and capriciously deprived of his property without due process of law" in violation of the Fifth Amendment by the

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12 Murray's statement (Petition at 19) that NBC retained rights in the program idea of *The Cosby Show* is flatly false. It has no foundation in the agreement or in the record.

action of the Court of Appeals. Apparently, this refers to the conduct of the court below in not agreeing with petitioner's citations of law.[13] Petitioner does not, and cannot, cite a single case finding a violation of due process on facts that even remotely resemble those of record here. His entire due process argument proceeds from his stubborn refusal to accept the fundamental premise of New York intellectual property law that " '[n]ot every good idea is a legally protectible idea.' " *Ed Graham Productions, Inc.* v. *National Broadcasting Co.*, 75 Misc. 2d 334, 337, 347 N.Y.S.2d 766, 769 (Sup. Ct. N.Y. Co. 1973).

The centerpiece of petitioner's Fifth Amendment argument is the Second Circuit's asserted refusal to follow *Werlin* v. *Reader's Digest Ass'n*, 528 F. Supp. 451 (S.D.N.Y. 1981). In *Werlin*, the plaintiff, a professional writer, sent Reader's Digest Association ("Reader's Digest") for possible *republication* an article she had previously published in a local paper. Reader's Digest liked the idea but not her writing, and proceeded to write and publish its own article on the same obscure subject. Expressly limiting its holding "to the facts of the case before it," the district court upheld Werlin's quasi-contract claim alone (dismissing claims of copyright infringement and misappropriation and awarding damages of $500) upon finding that Reader's Digest, which was actively offering to reprint *already published* articles, would not have "come across Werlin's article had she not mailed it in." 528 F. Supp. at 466.

NBC has engaged in no such offering, and it had already "found" Bill Cosby and his humor, as well as the family situation comedy genre, well before petitioner made his proposal in 1980. In fact, NBC broadcast both *I Spy* (1965-68) and *The Bill Cosby Show* (1969-71) years before Murray put pen to paper on

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13 Although the petition itself is vague on this issue, Murray does not appear to be urging that the actions of the courts below denied him procedural due process in any sense. If that *is* one of his claims, it is completely without merit. The motion for summary judgment was granted on the eve of trial after the close of all discovery. Murray has never suggested, as the dissent below implies (P. App. 18a), that he needed additional discovery to respond to the motion.

"Father's Day." Murray's claim that the Second Circuit violated his Fifth Amendment rights by failing to agree with his interpretation of an opinion that the Southern District of New York expressly limited to its own facts simply does not warrant review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

October 26, 1988

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